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VIA ECF AND HAND DELIVERY
Hon. Carol Bagley Amon
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Erica Randall v. City of New York *et al.*
16-CV-7197 (CBA) (SMG)

Dear Judge Bagley Amon:

I am an Assistant Corporation Counsel in the office of Zachary W. Carter, Corporation Counsel of the City of New York, and I am assigned to represent Defendants in the above-referenced matter. Pursuant to Rule 3(A) of the Court's Individual Motion Practices and Rules, I submit this letter to respectfully request that the Court schedule a pre-motion conference regarding Defendants' anticipated motion to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6). In her Complaint, Plaintiff fails to state a claim against any Defendant upon which relief may be granted. Plaintiff's Complaint should accordingly be dismissed in its entirety.

In this action under 42 U.S.C. § 1983, Plaintiff alleges that Defendants violated her civil rights by improperly removing her daughter from her custody. (Dkt. No. 1 ("Complaint" or "Compl.") ¶ 1.) Plaintiff alleges that the New York City Administration for Children's Services (ACS) brought a petition in Queens County Family Court in March 2012 alleging that Plaintiff had neglected her two daughters. (Id. ¶ 11.) On September 10, 2013, the Family Court found that Plaintiff had neglected her older daughter, and on October 22, 2013, Plaintiff's older daughter was placed in the joint custody of her grandparents. (Id. ¶¶ 19-20.) However, on November 12, 2014, the Appellate Division, Second Department reversed the Family Court's finding of neglect. (Id. ¶ 22.) Plaintiff claims, without elaboration, that the City of New York, ACS, and a John/Jane Doe ACS supervisor "knew or recklessly disregarded the fact that" Plaintiff's daughter "would not be in imminent danger if she remained in Plaintiff's care" and that Defendants lacked probable cause for the removal. (Id. ¶¶ 23-24.)

Plaintiff Has Failed to Allege a Constitutional Violation in Connection with Her Daughter's Removal from Her Custody

While Plaintiff asserts five causes of action, all five claims are rooted in the allegation that the removal of Plaintiff's daughter from her custody violated her constitutional rights. (See id. ¶¶ 39, 47, 50, 65, 68.) However, Plaintiff's daughter's alleged removal on October 22, 2013 stemmed from the Family Court's finding that Plaintiff had neglected her daughter. (Id. ¶¶ 19-20.) Plaintiff is thus attempting to hold Defendants liable for complying with the Family Court's custody order. While ACS employees may be held liable for the wrongful emergency removal of a child – effected prior to a judicial hearing – once a "court confirmation of the basis for removal is obtained, any liability for the continuation of the allegedly wrongful separation of parent and child can no longer be attributed to the officer who removed the child." Southerland v. City of New York, 680 F.3d 127, 153 (2d Cir. 2011).

ACS employees may be held liable for carrying out a Family Court's custody order only in very limited circumstances. To establish that the Family Court order does not shield ACS employees from liability, a plaintiff must "show that the government's request for removal or an order of protection was summarily approved by the Family Court on the basis of false or greatly flawed ACS representations, or that the judicial proceeding was otherwise substantially tainted." Graham v. City of New York, 869 F. Supp. 2d 337, 353 (E.D.N.Y. 2012) (citing Southerland, 680 F.3d at 154-55). The mere fact that the Family Court's finding of neglect was reversed on appeal is not sufficient to establish that the proceeding was "substantially tainted." See Ogunbayo v. Montego Med. Consulting P.C., No. 11 CV 4047 (NGG), 2012 U.S. Dist. LEXIS 190415, at *37-38 (E.D.N.Y. Sept. 18, 2012) (holding that the reversal on appeal of the Family Court's finding of neglect was not a "substantial procedural irregularit[y] in the Family Court proceeding that could be attributed to ACS," and therefore plaintiff had failed to state a constitutional claim against ACS). This is particularly clear here, where the Family Court decision was reversed simply because it was not supported by a preponderance of the evidence, with no finding of any fraud or misrepresentation by ACS. (Compl. ¶ 22); Matter of Reina R., 122 A.D.3d 746, 747-48 (N.Y. App. Div. 2014). Because Plaintiff seeks to hold Defendants liable for giving effect to a Family Court custody order, and has failed to allege any facts indicating that this order was based on fraud, gross misrepresentation, or otherwise substantially tainted by ACS, Plaintiff's claims should be dismissed.

Plaintiff Has Failed to Allege the Personal Involvement of Defendant "John/Jane Doe"

Instead of identifying any individual defendants, Plaintiff instead relies on vague and unsubstantiated allegations against an unknown individual. Moreover, even if Plaintiff had identified the John/Jane Doe Defendant she seeks to sue, "[i]t is well settled that, in order to establish a defendant's individual liability in a suit brought under § 1983, a plaintiff must show, *inter alia*, the defendant's personal involvement in the alleged constitutional deprivation." Grullon v. City of New Haven, 720 F.3d 133, 138 (2d Cir. 2013). As a result, "supervisor liability in a § 1983 action depends on a showing of some personal responsibility, and cannot rest on *respondeat superior*." Hernandez v. Keane, 341 F.3d 137, 144 (2d Cir. 2003).

Here, however, the Complaint is devoid of any facts regarding what Defendant Doe did or did not do, and simply alleges that this unnamed Defendant "was employed by Defendant City as a supervisor . . . who was assigned to supervise the ACS caseworkers involved in this matter." (Compl. ¶ 8.) Plaintiff otherwise treats Defendant Doe exclusively as a policymaker and proxy for the City of New York, asserting, for example, that "Defendants City and D[oe] had a policy, custom, usage, or practice" that is unconstitutional, or that "Defendants City and D[oe] caused an NYCC/ACS employee to remove Plaintiff's daughter from her custody." (Id. ¶¶ 26, 28.) Because Plaintiff fails to allege any facts indicating that Defendant Doe was personally involved in the alleged violations of Plaintiff's constitutional rights, the claims against this Defendant should be dismissed. See, e.g., Jean v. ACS Kings, No. 16 CV 6589 (MKB), 2017 U.S. Dist. LEXIS 10458, at *7 (E.D.N.Y. Jan. 24, 2017) (dismissing claims against ACS employees where plaintiffs failed to allege that these defendants "personally participated in the alleged wrongful removal and deprivation of [plaintiffs'] parental rights").

Plaintiff Has Failed to State a Claim for Municipal Liability

As an initial matter, because Plaintiff has failed to plead any violation of her constitutional rights by any individual ACS employees for the reasons discussed above, her claims against the City of New York must be dismissed as a matter of law. See City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point."); Segal v. City of New York, 459 F.3d 207, 219 (2d Cir. 2006) ("Because the district court properly found no underlying constitutional violation, its decision not to address the municipal defendants' liability under Monell was entirely correct.")

Even if Plaintiff had stated a claim for the violation of her constitutional rights, it is well-settled that a municipality may not be sued under § 1983 based on a theory of *respondeat superior*. See Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691-94 (1978). Rather, municipal liability attaches only if a plaintiff can "identify a municipal policy or custom that caused the plaintiff's injury" and "demonstrate a direct causal link between the municipal action and the deprivation of federal rights." Bd. of the Cnty. Comm'rs v. Brown, 520 U.S. 397, 403-04 (1997).

Here, Plaintiff relies on boilerplate assertions that the City of New York has unconstitutional policies with respect to child removal and provides inadequate training to ACS employees. (See Compl. ¶¶ 26-47, 52-65.) However, Plaintiff fails to allege specific facts concerning these policies and practices or indicating their existence, and instead simply refers vaguely to "similar abuse," "public reports and articles," "similar civil rights actions," and "numerous complaints and substantiated reports," without providing any examples from any of these categories. (Id. ¶¶ 36, 62.) Plaintiff's generic allegations are insufficient to state a Monell claim, because in order "to allege the existence of an affirmative municipal policy, a plaintiff must make factual allegations that support a plausible inference that the constitutional violation took place pursuant either to a formal course of action officially promulgated by the municipality's governing authority or the act of a person with policymaking authority for the municipality." Missel v. Cnty. of Monroe, 351 Fed. App'x 543, 545 (2d Cir. 2009). Accordingly, Plaintiff's mere assertions that municipal policies exist or inadequate training was provided are not sufficient to state a claim for municipal liability, and the claims against the City of New York should be dismissed.

For the foregoing reasons, Plaintiff fails to state a claim against any Defendant upon which relief may be granted. Defendants respectfully request that the Court schedule a pre-motion conference regarding Defendants' anticipated motion to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). In light of the fact that this motion would dispose of the case in its entirety, Defendants also intend to request that the Court stay discovery pending the disposition of this motion.

Thank you for your consideration of this request.

Respectfully,

/s/

Joshua C. Wertheimer
Assistant Corporation Counsel

cc: By ECF
Robert Marinelli, Esq.
Attorney for Plaintiff